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Pure Software in an Impure World?
WINNY, Japan's First P2P Case

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"Even the purest technology has to live in an impure world."[1]

In 2011, Japan's Supreme Court decided its first contributory infringement peer-to-peer case, involving Isamu Kaneko and his popular file-sharing program, Winny. This program was used in Japan to distribute many copyrighted works, including movies, video games, and music. At the district court level, Kaneko was found guilty of contributory infringement, fined 1.5 million yen, and sentenced to one year in prison. However, the Osaka High Court reversed the district court and found for Kaneko. The High Court decision was then affirmed by the Supreme Court, which settled on a contributory infringement standard based on fault, similar to the standard announced by the United States Supreme Court in MGM Studios

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[1] Benjamin Wallace, *The Rise and Fall of Bitcoin,* WIRED MAGAZINE (Nov. 23, 2011), *available at* http://www.wired.com/magazine/2011/11/mf_bitcoin/all.

v. Grokster*, though the two situations differ in many key respects. This article examines the Japanese decision through the lens of the U.S. regime developed in* Grokster *and* Sony Corporation of America v. Universal City Studios, Inc. *This article also explores a common complaint of those who oppose broad copyright rules: the idea that contributory infringement judgments and litigation hamper technological innovation. While critics note that the Winny litigation has had a chilling effect on Japanese Internet and software development, it is likely that Japan's Internet "lag" can be attributed to other factors.*

I. INTRODUCTION

Near the end of 2011, the Japanese Supreme Court issued its opinion in the "*Winny*" case. In its opinion, the Japanese Supreme Court affirmed[2] a 2009 decision of the Osaka High Court, which found that the author of Winny, a P2P file-sharing program popular in Japan, was not liable for copyright infringement by users of the software.[3] With this opinion, Japan adopted what Alfred Yen describes as a fault-based regime for P2P software authors, rather than a strict liability system.[4] Indeed, in finding for the program's author, the appellate court

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[2] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf. The Court's English translation can be accessed at http://www.courts.go.jp/english/judgments/text/2011.12.19-2009.-A-.No..1900.html.

[3] *File-Sharing App Creator Not Guilty of Copyright Infringement*, TORRENTFREAK (Dec. 23, 2011), http://torrentfreak.com/file-sharing-app-creator-not-guilty-of-copyright-infringement-111223; *see also ウィニー開発者　無罪確定へ　最高裁「著作権侵害、容認せず」[Winny Developer Innocent, Supreme Court Says It's Not an Approval of Copyright Infringement]*, 47NEWS (Dec. 20, 2011), http://sankei.jp.msn.com/affairs/news/111220/trl111220017420001-n1.htm (reporting the Supreme Court's decision).

[4] Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184,

agreed with his lawyers who likened the software developer to politicians building roads. One defense attorney asked, "Would you arrest the Transportation Cabinet Minister because he knew everyone was speeding on the highway [he authorized to be built]?"[5] According to Yen, the United States adopted such a regime in *MGM Studios v. Grokster, Ltd.* (*Grokster*).[6] *Grokster* held, "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[7] Under such a framework, the author of Winny would not be liable for copyright infringement by users because his aim in distributing the software was not to foster infringement.[8]

This article will discuss the procedural history of *Winny*, including the Kyoto District Court, the Osaka High Court, and the Japanese Supreme Court decisions. It will then examine how, through *Winny*, Japan has adopted a contributory infringement regime similar to that of the United States. This article will then discuss how pundits following *Grokster* and *Winny* have suggested that broad contributory infringement laws and even the threat of litigation can stifle technological innovation by software developers or software use by consumers. In response, the article will explore technology and P2P use before, during, and after *Winny* to determine whether such chilling effects are indeed slowing technological advances in Japan.

II. WINNY ON TRIAL

In May 2002, Isamu Kaneko released Winny, a decentralized P2P program similar to Freenet and WinMX that he had developed.[9] Winny distributed

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227 (2006).

[5] Hideki Miyanagi, *「Winny」開発者の金子勇氏が会見、本日中に控訴へ [An Interview with Winny Developer, Isamu Kaneko, As He Goes to His Appeal]*, INTERNET WATCH (Dec. 13, 2006), http://internet.watch.impress.co.jp/cda/news/2006/12/13/14225.html ("高速道路でみんなが速度違反をしていることを知っていたら、国土交通省の大臣は捕まるのか。").

[6] Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd., 545 U.S. 913 (2005).

[7] *Id.* at 914.

[8] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 10, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

[9] *Copyright Arrest in Japan*, WIRED (May 10, 2004), http://www.wired.com/techbiz/it/news/2004/05/63408; *see [freenet-chat] Freenet code in Winny and Share*, freenet chat (May 4, 2006), https://emu.freenetproject.org/pipermail/chat/2006-May/001560.html ("Winny and Share were inspired by the design principles of Freenet."); *see also A short history of file sharing in Japan*, FILE SHARING IN JAPAN BLOG (Mar. 14, 2008), http://p2pjapan.blogspot.com/2008/03/history-of-file-sharing-in-japan.html ("The west already had . . . Freenet, and this captured the attention of one Isamu Kaneko, a grad

content by connecting to users like nodes in a larger system.[10] Like Freenet, Winny purported to keep users' identities untraceable.[11] Kaneko, a former researcher in the computer science department at Japan's prestigious Tokyo University, released the program for free through his own website and Japan's infamous anonymous forum 2Channel ("2ch").[12] Kaneko made announcements about the program, including updates of the software, on 2ch's file sharing sub-forum, which is widely known for copyright violations.[13] By 2006, three million people had used Winny and the program jockeyed for the position of most widely used P2P software in Japan with its predecessor WinMX.[14]

Though Winny could be used to distribute material legally, it was widely used to distribute copyrighted material without the copyright holder's consent.[15] On November 28, 2003, the Kyoto Prefectural Police arrested two Japanese users of Winny for sharing copyrighted material.[16] The two suspects admitted to the

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student at Tokyo University. While Napster and WinMX need central servers to keep track of who is sharing what file, Freenet is made up of a network of [connected clients]. . . . Kaneko adapted these basic ideas, and in spring of 2002, released Winny onto the download board on 2channel.").

[10] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1-2, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

[11] *File-Sharing App Creator Not Guilty of Copyright Infringement*, *supra* note 3.

[12] Salil K. Mehra, *Keep America Exceptional! Against Adopting Japanese and European-Style Criminalization of Contributory Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 811, 816-817 (2011) ("[Kaneko] distributed Winny through his own website . . . collecting feedback via the anonymous, and notorious, Internet forum 2Channel (nichanneru). In particular, he made these announcements in a sub-forum dedicated to file swapping, where many of the participating likely transmitted copyrighted works without permission."); *see also* Colette Vogele, *Grokster, Japan Style*, STAN. CENTER FOR INTERNET AND SOC'Y CYBERLAW BLOG (Dec. 13, 2006), http://cyberlaw.stanford.edu/blog/2006/12/grokster-japan-style ("The Kyoto District Court convicted Isamu Kaneko . . . of inducing others to infringe copyright.").

[13] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 6-7, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf (referring to posts on 2ch); *see also* Mehra, *supra* note 12, 816-817 ("In particular, he made these announcements in a sub-forum dedicated to file swapping, where many of the participating likely transmitted copyrighted works without permission. Indeed, some Winny users faced charges for direct infringement—and were convicted.").

[14] A Japanese record and software industry survey in 2007 pegged Winny at 27 percent of P2P market share, with LimeWire at 18.8 percent, and WinMX at 15 percent. *Japanese File-Sharing Population Explodes*, TORRENT FREAK (Dec. 21, 2007), http://torrentfreak.com/japanese-file-sharing-population-explodes-071221.

[15] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 6-7, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

[16] *Decision of the Supreme Court in the Winny criminal case*, NAKAMURA & PARTNERS (Mar. 5 2012), http://www.nakapat.gr.jp/english/legal/2012/03/decision_of_the_supreme_court_1.html.

violations, but shortly after their arrest the Kyoto police also searched Kaneko's home and took the programming code for Winny.[17] On May 10, 2004, the High-tech Crime Task-force of the Kyoto police arrested Kaneko for aiding copyright infringement.[18] The Kyoto District Court found enough evidence that Kaneko knew that Winny could be, and was, used for copyright infringement, and that his desire to create new forms of business were sufficient to meet the requirements for intent and a profit motive.[19] On December 13, Kaneko was convicted, fined 1.5 million yen (approximately 17,000 dollars), and sentenced to one year in prison.[20] This was Japan's first decision regarding P2P file sharing.[21]

III. THE OSAKA HIGH COURT

Kaneko and his lawyers appealed to the Osaka High Court, and in 2009 the Osaka High Court reversed the district court's decision.[22] The Osaka High Court noted, "Since we cannot find that Winny was offered solely or chiefly to promote online copyright infringement, we hold that we cannot conclude that defendant['s conduct] meets the standard for the crime of contributory copyright infringement." [23] In its opinion, the High Court discussed Winny and its relationship to direct infringement. While Kaneko had authored and distributed Winny, and the two users who had used the software had been convicted of direct infringement, the High Court found that the Winny software by itself was "value-neutral."[24] That is, while Kaneko might have known that Winny *could* be used for copyright infringement, according to the court it was not distributed solely or primarily to facilitate copyright infringement.[25] Nor did the High Court find the requisite bad intent or profit motive required for criminal inducement.[26] To support this finding, the court pointed to warnings Kaneko posted on 2ch and his own website warning users not to break copyright and vague promises to build copyright tracking and royalty payment systems into Winny.[27] In one post, Kaneko, under the handle "Mr. 47," wrote that beta 8.1 of Winny was not

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[17] *Winny,* UGUU (Sept. 6, 2006), http://www.uguu.org/winny/2006-09-05.txt.
[18] *File-Sharing App Creator Not Guilty of Copyright Infringement*, *supra* note 3.
[19] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 3-4, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.
[20] *Japan Court Acquits File-Share Software Creator*, AFP (Oct. 7, 2009), *available at* http://www.google.com/hostednews/afp/article/ALeqM5hsDP_5ygycPvRSCdXvLPQ-6KWKYA.
[21] *Id.*
[22] Japanese appellate courts can review factual and legal questions. CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 112 (2d ed. 2008).
[23] Mehra, *supra* note 12, at 818.
[24] *Id.*
[25] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 4-5, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.
[26] Mehra, *supra* note 12, at 818.
[27] *Id.* at 818-819.

anonymous and that users should not exchange illegal files.[28] The High Court interpreted the post as a warning that users should not violate copyright.[29] Therefore, the court acquitted Kaneko, allowing the software author to avoid both jail time and the fine levied against him by the district court.

Prosecutors and critics of Kaneko suggested, however, that Kaneko's original purpose was to provide a platform for copyright infringement.[30] Indeed, Kyoto police cited Kaneko's anti-copyright views when he was arrested. The police quoted Kaneko as saying, "I am doubtful about the current ways businesses control digital content. It's wrong that big business uses the police to crack down on violations and maintain the status quo. The only way to destroy that system is to continue to spread ways to violate copyright laws."[31] Critics also characterized Kaneko's warnings about not exchanging copyrighted material on Winny as another example of his inducement of infringement.[32] In their view, his warning was to alert users that the software could be used to track downloaders. On the basis that Kaneko's actions provided the requisite bad intent, prosecutors appealed the Osaka decision to the Supreme Court.

IV. THE JAPANESE SUPREME COURT[33]

On October 21, 2009, the Osaka High Public Prosecutors' Office appealed Kaneko's acquittal to the Japanese Supreme Court.[34] On December 20, 2011, the Court's Third Petty Bench, made up of presiding Justice Okabe and Justices Tahara, Nasu, Terada, and Otani, announced its decision regarding Winny. In a four to one decision, the Supreme Court affirmed the Osaka High Court.[35] The Supreme Court's majority noted that it could not be proven that Kaneko intended

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[28] *Id.*
[29] *Id.*
[30] John P. Mello Jr., *Arrest of Winny Author 'Overkill'*, TECHNEWSWORLD (May 13, 2004), http://www.technewsworld.com/story/ptech/33774.html.
[31] *Id.*
[32] *Cf.* Mehra, *supra* note 12, at 820.
[33] The author wishes to express his gratitude to Shinya Nochioka and Yuuka Kawazoe for their help in translating the Supreme Court decision shortly after it was released.
[34] Hideki Miyanagi, *Winny開発者裁判は最高裁へ、大阪高検が上告 [Osaka High Public Prosecutor Appeals Winny Decision to Supreme Court]*, INTERNET WATCH (Oct. 21, 2009), http://internet.watch.impress.co.jp/docs/news/20091021_323296.html?mode=pc; *see also* Press Release, Japan and International Motion Picture Copyright Association, Inc., JIMCA Welcomes Appeal Against Acquittal Of Winny Developer (Oct. 22, 2009), http://www.mpalibrary.org/assets/Japan_WinnyCase_Oct09.pdf (welcoming the Osaka High Public Prosecutors' Office's decision to appeal the acquittal).
[35] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 1, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

to promote copyright violations.[36] Since Winny could be used for both infringing and non-infringing uses, and users ultimately decided whether to trade copyrighted materials, Kaneko, who was only generally aware that Winny could be used unlawfully, could not be held liable.[37] The dissenting opinion noted that Kaneko knew there was a high probability that his software would be used to violate copyrights.[38] The majority rejected the dissenting opinion's "high probability" argument outright, noting that Kaneko did not know that the software would be used to violate copyrights, and that the decision to do so rested with Winny users.[39]

The majority reframed the analytical framework applicable to Winny-style secondary infringement. The Court held that releasing and providing a software program would constitute an act of aiding copyright infringement only:

> (i) where a person has released and provided a software program while perceiving and accepting a specific and immediate risk of copyright infringement to be committed with the use of the software program, and such copyright infringement has actually been committed and (ii) where in light of the nature of the software program, the objective situation of use of the software program, and the method of providing it, it is highly probable that among those who acquire the software program, a wide range of persons will use the software program for the purpose of infringing copyright, to a level where their use cannot be tolerated as exceptional, the provider has released and provided the software while perceiving and accepting such high probability, and the principal has actually committed copyright infringement with the use of the software program.[40]

In short, the Court found that while Kaneko knew that an increasing number of users were infringing copyright, he was not aware that their use rose to the level that would include him in a strict liability situation.[41]

Next, the majority addressed the prosecutors' three major factual allegations against Kaneko: (1) When Kaneko announced development of Winny

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[36] *File-Sharing App Creator Not Guilty of Copyright Infringement*, *supra* note 3.
[37] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 8-10, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.
[38] *Id.*
[39] *File-Sharing App Creator Not Guilty of Copyright Infringement*, *supra* note 3.
[40] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 6-7, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.
[41] *Id.* at 7.

in a forum on his website, other users in that forum warned him that users would use the program to exchange copyrighted programs; (2) After Kaneko released Winny, Kaneko read articles in magazines, newspapers, and websites which suggested it would be difficult to prosecute the author of P2P software; and (3) Kaneko downloaded files (which were likely copyrighted) through Winny.[42]

In analyzing the first allegation, the Court found that, while Kaneko must have known that an increasing number of users would use Winny for copyright infringement, [43] Kaneko could not be held liable as a matter of law.[44] The truth of the first allegation was insufficient to prove that Kaneko intended to facilitate copyright infringement, because he had announced and released Winny as "an experiment to verify whether Freenet P2P can be put into practical application."[45] Additionally, Kaneko had posted comments warning users not to trade copyrighted files.[46]

The majority then disposed of the prosecutors' two remaining allegations against Kaneko. In regard to the second allegation, the Court found that information posted to the Internet or in print media on the misuse of Winny was not wholly accurate, and that Winny was not primarily authored to facilitate copyright infringement.[47] Countering the prosecutors' third claim, the Court noted that while Kaneko used Winny to download files that were likely copyrighted, his usage could not give rise to a claim that Kaneko knew the scale of infringement happening on the Winny network.[48] On the contrary, since Kaneko was attempting to test and develop a large-scale P2P network, Kaneko needed to download those files to ensure that the network was functioning smoothly.[49] Therefore, the Court found that it would be inequitable to overturn the Osaka High Court's decision because Kaneko could not have known that the misuse of Winny had grown so much that he could be found strictly liable for its usage.[50]

However, the majority opinion left the door open for an inducement argument. The government accused Kaneko under Penal Code Article 62 for

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[42] *Id.* at 8.
[43] *Id.*
[44] *Id.* at 9.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 9-10.
[48] *Id.* at 10.
[49] As a user of Winny, Kaneko likely knew the number of people illegally using Winny was increasing. Presumably an increasing number of users offering copyrighted files would lead to an increase in the files themselves, which could be searched for and downloaded.
[50] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 10, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

aiding and abetting a principal, rather than under Penal Code Article 61 for inducing the crime. However, under the majority's rubric, a P2P author who releases software for the express purpose of exchanging copyrighted files could have the requisite culpability to be found guilty for inducement. In this case, the majority found that Kaneko did not have the required intent because he was more interested in creating a P2P network than the exchange of copyrighted files.[51]

In addition, while Justice Otani's dissent does not dispute the majority's fact-finding, he disagrees with the majority's framework and the application thereof.[52] According to the dissent, Winny effectively facilitates the anonymous and efficient exchange of copyrighted material.[53] In addition, Kaneko, by uploading the software to a public website, allowed unlimited public access to the software.[54] Especially important to Otani was evidence suggesting that at least forty percent of files exchanged on the network were copyrighted material.[55] Objectively, there was a high probability that users of Winny would violate copyright.

Considering these facts, Otani argued that Kaneko must have been aware of the high risk that users would misuse Winny, especially when he failed to block access to Winny and did not introduce measures to prevent copyright infringement.[56] Otani criticized the majority's overvaluation of Kaneko's intent, including his warnings to online users,[57] and took issue with the majority's evaluation of Kaneko's deep commitment to creating a new P2P system, thereby negating his bad intent.[58]

The disagreement between the majority and the dissent results from their differing interpretations of the Penal Code. Indeed, there has been some suggestion that the justices' differing backgrounds led to Kaneko's acquittal.[59] Of the majority, Presiding Justice Okabe and Justice Terada both specialize in civil law,[60] while Justices Tahara and Nasu specialize in advocacy.[61] Of the five justices, only

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[51] *Id.* at 9.
[52] *Id.* at 11.
[53] *Id.* at 13-14.
[54] *Id.* at 14.
[55] *Id.*
[56] *Id.* at 15-17.
[57] *Id.*
[58] *Id.*
[59] The author expresses a great deal of gratitude to Shinya Nochioka for this insight.
[60] *See OKABE, Kiyoko*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/justices/okabe/index.html (last visited Feb. 17, 2012) (listing Justice Okabe's past legal experience); *TERADA, Itsuro*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/justices/terada/index.html (last visited Feb. 17, 2012) (listing Justice Itsuro's past legal experience).
[61] *See* JUSTICES OF THE SUPREME COURT: TAHARA, MUTSUO, SUPREME COURT OF JAPAN

Justice Otani has a background in criminal law, which suggests that the justices forming the majority misunderstood the applicable criminal code.[62] However, every inference the majority draws to negate Kaneko's liability indicates a pro-technology stance. Earlier in its opinion, the Court, when discussing the analytical framework to apply to *Winny*-style infringement cases, suggested that it ought not allow its decision to have a chilling effect on software development.[63] This factor will be discussed later in this article.

V. WINNY, GROKSTER, AND SONY

In the *Grokster* case, the U.S. Supreme Court decided that the company behind the file sharing software Grokster *should* be held responsible for the copyright infringement by users of the software.[64] This decision seemed to reverse *Sony Corporation of America v. Universal City Studios, Inc.*,[65] in which the Supreme Court held that the makers of an infringing tool could not be held liable for infringement by users. Therefore the *Winny* and *Grokster* cases seem like they should be decided similarly. Like the defendant companies in *Grokster*, Kaneko:

> [D]istributed software that established peer-to-peer networks on the Internet. These networks allowed users to make any type of file available for others to download. The associated software also allowed users to submit search queries to locate desired files. . . . [and] . . . the vast majority of files exchanged over the networks turned out to be infringing copies of copyrighted songs and movies.[66]

However, the factors in *Winny* suggest that, even using a *Grokster*-like test, Kaneko would not be found liable for infringement in Japan or the United States. While *Grokster* seems to hold authors of P2P tools liable for infringement, it is clear that the *Grokster* decision was made because the authors *encouraged* infringement by Grokster users. However, according to the Osaka and Supreme

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(2006), http://www.courts.go.jp/english/justices/tahara/index.html (last visited Feb. 17, 2012) (listing Justice Tahara's past legal experience). Justice Kohei Nasu was replaced by Justice Masaharu Ohashi in 2012. As such, Justice Nasu's biography has been removed from the Supreme Court homepage. A cached version was last accessed at http://webcache.googleusercontent.com/search?q=cache:fpAtuAuuXiYJ:www.courts.go.jp/english/justices/nasu.html+&cd=1&hl=en&ct=clnk&gl=us on Feb. 17, 2012.

[62] JUSTICES OF THE SUPREME COURT: OTANI, TAKEHIKO, SUPREME COURT OF JAPAN (2006), http://www.courts.go.jp/english/justices/otani/index.html.

[63] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 6, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

[64] Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd., 545 U.S. 913 (2005).

[65] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[66] Yen, *supra* note 4, at 188.

Courts, Kaneko did not encourage infringement to nearly the same level.

Though some of the language in the Japanese court decisions is similar to that of the U.S. Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*,[67] both countries seem to have settled on a similar regime for P2P secondary infringement. The Japanese Supreme Court has left the door open for *Grokster*-like rulings in future cases where the author intends to foster copyright infringement.

In *Groktser,* the U.S. Supreme Court settled an ongoing split in U.S. judicial decisions regarding the appropriate way to evaluate copyright infringement cases.[68] Some courts concentrated on a potential contributory infringer's fault, while others used a strict liability standard to protect the copyright holder's rights.[69] In *Grokster*, the Court focused on the potential contributory infringer's fault. Justice Souter noted that defendants Grokster and StreamCast "took active steps to encourage infringement," including marketing itself as an alternative to Napster, flaunting the illegal uses of its software to get sued, and using advertising to generate revenue.[70] In addition, StreamCast possessed internal e-mails and promotional material with business plans to position their software as a place where Napster refugees could download copyrighted files.[71] The Court found that "the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted work."[72] All of these actions strongly ascribed fault to the *Grokster* defendants.

Conversely, while an outside observer may question the Japanese courts' interpretation of the facts, once they established those facts, Kaneko's actions and intent simply did not rise to a level where fault could be ascribed. While Kaneko could have been found guilty of contributory infringement under a strict liability regime, his behavior (according to the courts) was not enough under the Japanese Supreme Court's *Grokster*-like framework.[73] Kaneko only posted about updates to the software and later even warned users not to violate copyright laws. His actions seemed to have vague connections to business, as Kaneko only abstractly suggested building a revenue model into the software. According to the Japanese Supreme Court, Kaneko did not develop and release Winny to exchange copyrighted files, but rather to test ideas about P2P and to win acclaim from his

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[67] *Grokster*, 545 U.S. at 417.
[68] Yen, *supra* note 4, at 192.
[69] *Id.*
[70] *Sony*, 464 U.S. at 924-926.
[71] *Id.* at 925.
[72] *Id.* at 926.
[73] Saikō Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 65 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1, 10, http://www.courts.go.jp/hanrei/pdf/20111221102925.pdf.

fellow 2ch posters.[74]

However, as Justice Otani states in his dissent, it is possible to argue that the facts in *Winny* resemble those in *Grokster*, and that Kaneko *did* aid copyright infringement. As noted above, Kaneko mentioned that he hoped to destroy the current copyright regime, which may be similar to StreamCast's desire to enter litigation.[75] Kaneko posted information and updates to 2ch's software forum, a place known for copyright infringement, so he should have known that Winny would be used for infringement. Even the software's title, Winny, was a link to previous P2P software, WinMX, which was also used for infringement. The connection is similar to how Grokster and StreamCast targeted former Napster users as potential new users. Kaneko knew illegal files were being traded on the network through his own use. Moreover, one could, as the Kyoto District court did, see Kaneko's desire to destroy the copyright regime or to develop business models as sufficient bad intent to criminalize his actions.[76] Finally, Winny *did* aid copyright infringement. The only question, even for the Japanese Supreme Court, was Kaneko's intent. Under the strict liability regime followed before Grokster, and which Justice Otani suggests is the appropriate standard for in *Winny*, Kaneko may have been convicted, as strict liability would have made Kaneko legally responsible for the damages caused by Winny users, regardless of Kaneko's personal intent.

Ultimately, however, after taking the Kyoto District Court and Osaka High Public Prosecutors' views into consideration, the court found that Kaneko's actions in releasing, advertising, and promoting his software were not undertaken to make money (and, therefore, were different from those of the creators of Grokster and StreamCast). Under a fault-based regime, since Kaneko was not specifically positioning Winny to infringe copyrights, nor was he planning to generate revenue (or like Grokster, promoting Winny as an alternative to Napster), Kaneko would not have been convicted.

Indeed, Justice Souter noted in *Grokster*, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the

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[74] *Id.* at 9.

[75] Like Kaneko, StreamCasts's aim was to get sued to force changes in the law but the company's ultimate goal was to solidify their business position. *See* Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd., 545 U.S. 913 (2005).

[76] Certainly, copyright scholar Fumio Sakka, in his *Treatise on Copyright Law*, believes that the Osaka High Court Decision does not fit with Japanese copyright law and may encourage file sharing in Japan. *See* SAKKA FUMIO (作花文雄), SHŌKAI CHOSAKUKENHŌ (詳解著作権法) [TREATISE ON COPYRIGHT LAW] 821-22 (4th ed. 2010) (discussing the Winny case through 2009).

resulting acts of infringement by third parties."[77] Though Kaneko knew users were using Winny for copyright violation, the Osaka High Court found (in language the Supreme Court seemed to echo, though it was more concerned with intent) that the program itself was not an inducement to violate copyright because it could also be used for non-infringing purposes.[78] The Osaka decision rests on the idea that Winny had non-infringing uses and was not "offered solely or chiefly to promote online copyright infringement," and, therefore, likely would not meet the clear expression or affirmative steps to foster infringement that Souter noted.[79]

Instead, the Osaka court's discussion of Winny being "value-neutral" is similar to the *Sony* decision, where the U.S. Supreme Court decided that using a VCR player to time-shift television programming at home was a non-infringing use. In coming to this conclusion, the *Sony* majority noted that rewarding the copyright owner was a "secondary consideration,"[80] and decided that the VCR technology in question could not be banned if it was "capable of substantial non-infringing uses."[81] If a piece of technology had non-infringing uses, its creators could not be liable for the actions of users. When Kaneko's "level" of inducement is taken into consideration (for example, his posts on 2ch, his blog about software updates, and the subsequent warning to users), it is clear that his behavior was not on par with Grokster's, and therefore *Winny* likely fits better into a *Sony* analytical framework. A *Sony*-style framework, in which the author of a potentially infringing tool is not liable for user infringement, is incorporated in the *Grokster* fault-based regime when the requisite level of intent is not met.

However, as noted above, the Japanese Supreme Court's decision to affirm the Osaka High Court also suggests that it would be open to an inducement style argument; a P2P software author could have been prosecuted, as in *Grokster*, if his or her behavior had encouraged others to use the software to exchange copyrighted files, or if the author had specific knowledge the P2P program would be used to do so.

VI. THE CHILLING EFFECTS OF *WINNY*

Often mentioned in cases of software or technology-facilitated contributory infringement are the potential chilling effects that such cases could have against technological innovation.[82] Pundits worry that guilty verdicts or even

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[77] *Grokster,* 545 U.S. at 919.
[78] Mehra, *supra* note 12, at 818.
[79] *Id.* (citing Osaka Kōtō Saibansho [Osaka High Ct.] Oct. 8, 2009, Hei 19 no. 461 (Japan) (translated by Mehra)).
[80] *Grokster*, 545 U.S. at 429 (quoting *U.S. v. Paramount Pictures, Inc.*).
[81] *Id.* at 442.
[82] *E.g.* Mike Masnick, *The Chilling Effects of the Entertainment Industry's Grokster Position*, TECH DIRT (Jan. 28, 2012),

litigation could hamper technological development by scaring software developers from creating or releasing new software.[83] However, evidence suggests that *Winny* has had little effect on P2P use or development in Japan.

Before the *Grokster* and *Winny* decisions, pundits feared that litigation would discourage even legitimate software development. For example, shortly before the *Grokster* trial began, the technology-focused website Tech Dirt ran a story titled "The Chilling Effects of the Entertainment Industry's Grokster Position."[84] The article pointed to a web post describing a professor hiding his research on network software systems for fear of liability, since his work could be used for copyright infringement.[85] Such articles were widespread before and after the decision. The debate is also important because many pundits have described *Sony* as a rule that would encourage technological innovation while *Grokster* stifles it.[86] The *Grokster* court did comment on such a chilling effect; Justice Breyer, in his concurrence, noted that there are a number of legitimate non-infringing uses for P2P software and the desire to develop a standard which balances a copyright holder's rights and the rights of others to engage in commerce.[87]

It should be noted, however, that such a chilling effect would be more pronounced in Japan. Like Europe, Japan has criminally prosecuted contributory infringers.[88] Logically, in such an environment, software developers would be even less likely to release innovating new software, since a criminal trial would be expensive, stressful, and, like Kaneko's district court case, could lead to prison sentences.

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http://www.techdirt.com/articles/20050329/0152229.shtml.

[83] *Id.*

[84] *Id.*

[85] *See* Ed Felten, *A (True) Story for Grokster Eve*, FREEDOM TO TINKER (Jan. 28, 2012), https://freedom-to-tinker.com/blog/felten/true-story-grokster-eve ("[The professor's concern is] that if too many people find out what he has done and realize its value, some of them may start using it for illegal purposes. . . . It's hard to blame him, given the unsettled state of secondary liability law. If some people start using his system illegally, will he be liable?").

[86] *Grokster and Streamcast Face the Music,* THE ECONOMIST (Mar. 30, 2005), http://www.economist.com/node/3785847 ("Some suggest that the latest attempt to curb illicit file-swapping—legal action against the technology that drives P2P networks—threatens the future of innovation. Justice Antonin Scalia . . . suggested that a ruling for the plaintiffs in MGM v. Grokster could stifle development of new technologies, since potential innovators might fear that, as he put it, 'I'm a new inventor, I'm going to get sued right away.'"); *see also* Doug Panzer, *Japanese Court's Reversal in File-Sharing Case is a Clear Win for Software Innovators,* PANZER ON POINT (Oct. 9, 2009), http://douglaspanzer.blogspot.com/2009/10/japanese-courts-reversal-in-file.html.

[87] Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd., 545 U.S. 913 (2005).

[88] *See* Mehra, *supra* note 12, at 812.

The reaction in the tech world to the Osaka decision was strongly in favor of both the Osaka High Court and the Supreme Court. After the High Court Decision, Tech Dirt noted that "the higher court got it right, recognizing that just because the software *could* be used for copyright infringement does not mean that the developer is automatically guilty of copyright infringement."[89] The site further decided that the litigation was "a massive waste of time and resources."[90] On his blog, attorney Doug Panzer wrote glowingly of the Osaka decision, stating:

> [The] ruling is a departure from recent rulings in both the US and Sweden, and clearly demonstrates that Japan's courts have an eye toward fostering innovation rather than protecting the status quo on behalf of content owners…Yesterday's ruling from the Japanese high court clearly recognizes the goal of Sony, which is the continued encouragement of technological innovation…The reversal of Kaneko's conviction demonstrates to Japanese content providers that the courts of that country are not going to be as cooperative as some other courts in policing file-sharing related copyright infringement if it means stifling innovation.[91]

After the Japanese Supreme Court ruling, P2P news site TorrentFreak stated in glowing terms that Kaneko's "ordeal is over."[92] Tech Dirt went even further regarding Kaneko's litigation since 2004:

> [T]hat's many years of this guy's life tied up in the judicial system. Already, editorials in Japan are calling the situation "absurd," and noting: *The police and public prosecutors should realize the negative psychological effect that their actions must have had on people trying to develop new computer technology*. Indeed. If you're dragging the developers of new technologies to court for more than five years just because some users of the software may break the law, you're creating a massive chilling effect on developers. Who's going to develop anything that might be used to infringe -- even if it has mainly productive non-infringing uses -- if it may lead to such a horrible and drawn out process?[93]

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[89] Mike Masnick, *Japanese Prosecutors Still Want To Blame Developer of File Sharing Program for Copyright Infringement By Users*, TECHDIRT (Oct. 28, 2009), http://www.techdirt.com/articles/20091027/1302086698.shtml.
[90] *Id.*
[91] Panzer, *supra* note 86.
[92] *File-Sharing App Creator Not Guilty of Copyright Infringement*, *supra* note 3.
[93] Mike Masnick, *Japanese Supreme Court Says Developer of File Sharing Software Not Guilty of Infringement Done By Users*, TECHDIRT.COM, http://www.techdirt.com/articles/20111227/04240017202/japanese-supreme-court-says-

Much of the praise for *Winny* stems from the idea that the case, like the *Sony* decision, encourages technological innovation by not putting developers of new technology in fear of prosecution.

However, questions remain as to whether *Winny* has actually had a chilling effect on software development or use in Japan. Exact figures are hard to come by, but Waichi Sekiguchi, senior staff writer at the Nikkei Weekly, drew a connection:

> Japan significantly lags [behind] the U.S. in developing cloud computing technology, partly because Japanese software engineers have become allergic to file-sharing technology due to the uproar over the Winny case. In general, Japan has fallen behind not only the U.S. but also Europe and the rest of Asia in developing software. It is hoped that the high court's "not guilty" verdict will go a long way toward creating an environment that is much more conducive to software development in Japan.[94]

Mehra asks what the effects would be if Mark Zuckerberg was jailed briefly after introducing Facebook, but before it had become an accepted part of society.[95] He implies that surely, Zuckerberg, or the inventors of platforms like Twitter, Dropbox, or other small technologies that grew into widespread use would think twice before distributing their products, even though such technologies have substantial non-infringing uses.[96] As technology further becomes integral to the public's life, Facebook, Twitter, and file sharing will seem less like criminal behavior and more like the norm to individual citizens (and potential jurors).

While the effect on developers is unquantifiable, it appears that as Kaneko wrestled with legal issues, the P2P hydra in Japan simply grew more heads while better insulating software authors. Share, an anonymously developed closed-

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developer-file-sharing-software-not-guilty-infringement-done-users.shtml.

[94] Waichi Sekiguchi, *Software Writers Catch Legal Break*, THE NIKKEI WEEKLY, Oct. 26, 2009.

[95] Mehra, *supra* note 12, at 819.

[96] *Id*. That said, one must ask whether there is a huge difference in usage between Dropbox and Megaupload. Certainly, other online "file lockers" have been scared into compliance after the arrest of MegaUpload founder Kim Dotcom. In particular, File Sonic disabled the ability for users to download files uploaded by other users in the wake of Dotcom's arrest. *See Filesonic Kills File-Sharing Service After MegaUpload Arrests,* TORRENTFREAK (Jan. 23, 2012), http://torrentfreak.com/filesonic-kills-file-sharing-after-megaupload-arrests-120122 ("[Filesonic] has disabled all sharing functionality, leaving users only with access to their own files.").

source P2P software, was developed and released during Kaneko's arrest and trial.[97] In 2008 three Share users were arrested in Kyoto.[98] Subsequent cases involved the sharing of cartoons, television dramas, the Nintendo DS game *Dragon Quest IX*, and other video games.[99] According to the Japan and International Motion Picture Copyright Association, eighteen more users were arrested in January 2011 for sharing copyrighted files on Share.[100] Share was followed by Perfect Dark, written by an author known only as The Chairman,[101] and which purports to keep users more anonymous than Winny or Share.[102] After the Japanese parliament passed more stringent additions to Japan's Copyright Act in 2009 (the provisions took effect on January 1, 2010), a number of users of Perfect Dark were arrested for sharing cartoons on the network.[103] Demonstrably, claims that Kaneko's litigation might stifle software development are overblown; despite the Winny arrests, users have continued to use file-sharing software, such as Share, Perfect Dark, and Bittorrent.

A. Winny may not be the reason Japan's Internet is "stunted"

Moreover, if Japan lags behind the United States and Europe in cloud computing, P2P, and other information technological advancements, Winny may

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[97] *See Male Arrested in Japan for Uploading via Perfect Dark (Update 2)*, ANIME NEWS NETWORK, http://www.animenewsnetwork.com/news/2010-01-27/male-arrested-in-japan-for-uploading-via-perfect-dark (Jan. 27, 2010) ("During Kaneko's arrest and trial, another anonymous developer created the Share program which promised better protection of users' anonymity on Winny's file-sharing network.").

[98] Shigeru Nagasawa, *「Share」での著作権侵害を初摘発、「コードギアス」などアップロード [First Copyright Infringers on Share Caught]*, INTERNET WATCH (May 9, 2008), http://internet.watch.impress.co.jp/cda/news/2008/05/09/19494.html.

[99] Jared Moya, *Japanese Cops Arrest 10 File-Sharers*, ZEROPAID (Dec. 2, 2009), http://www.zeropaid.com/news/87319/japanese-cops-arrest-10-file-sharers.

[100] Press Release, Japan and International Motion Picture Copyright Association, Inc., *ファイル共有ソフトを使用した著作権法違反事件 集中一斉取締の実施について* [Concerning the Implementation of a Concentrated Simultaneous Crack-Down on Cases of Violating of the [Japanese] Copyright Act Using File-Sharing Software] (Jan. 14, 2011), http://www.riaj.or.jp/release/2011/pr110114.html.

[101] *Perfect Darkの使い方* [The Method of Using Perfect Dark], THE INTERNET SOCIETY, http://www.interz.jp/p2p/perfectdark2.html (last visited Dec. 10, 2011) ("会長さんにより開発中のファイル共有ソフトPerfect Darkの初期設定・使い方等を解説するサイトです [Set up of the P2P Software, Perfect Dark, by the Chairman—This is a site which explains its usage.]").

[102] *Male Arrested in Japan for Uploading via Perfect Dark*, *supra* note 97.

[103] *See id.* (noting the first arrest of a Perfect Dark user); *see also 2nd Man Arrested for Uploading Anime via Perfect Dark (Updated),* ANIME NEWS NETWORK (June 6, 2010), http://www.animenewsnetwork.com/news/2010-06-10/2nd-man-arrested-for-uploading-anime-via-perfect-dark ("Matsumoto is only the second known person arrested for using Perfect Dark.").

not be the only culprit because Japan has a different relationship with technology than does the United States. Noting Japan's "computer lag," W. David Marx said, "[W]hen you look at the 'cultural development' of the Net, Japan still feels stunted."[104] It may seem counterintuitive, considering the reputation of Japanese technology in the United States, but especially in PC-based (as opposed to the closed mobile web accessed by Japanese cellphones) Internet penetration, Japan lags behind the United States. While the nation boasts high Internet diffusion through cell phones, PC use has not taken hold in the same way. Marx opines that the huge gap in the 1990s between Internet and computer use in Japan and the United States[105] has had a significant impact on Internet usage today, as Japan's younger generation did not grow up with Internet technology readily available and thus are neither comfortable with computers nor communicating through them.[106] In another article, Marx specifically compares the stunted Internet cultural penetration in Japan with that in the United States:

> Despite high Internet penetration, however, web culture has yet to establish itself as a *legitimate* pillar of content in Japan. Most *offline cultural producers, like newspapers and weekly magazines, do not put a significant amount of material online*. There are no start-up sites with the influence of Boing Boing, or the political importance of Huffington Post, Talking Points Memo, and the Drudge Report. There have been few D.I.Y. bloggers who rival offline cultural influencers; no 14 year-old bloggers invited to haute couture fashion shows in the vein of Tavi Gevinson. In fact, the Internet in Japan still retains a "techy" or "nerd" image, and an impenetrable otaku site like 2ch is still the central heart of Internet meme creation. . . . [T]he overall result is that the Internet in Japan is not picking up the slack of the traditional culture markets as they shrink. Most importantly web use in Japan is relatively passive and anonymous, and this only further questions the culture created upon it.[107]

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[104] W. David Marx, *Japan's Former Computer Lag*, NEOJAPONISME (Aug. 14, 2011), http://neojaponisme.com/2011/08/14/japans-former-computer-lag/.

[105] Marx cites a study that found that in 1993, less than ten percent of Japanese offices had a PC, compared to nearly forty-two percent in the United States; in January 1995, Japan had 96,632 Internet-connected systems, compared to the 3,179,170 systems in the United States. TSUTSUMI SEIJI, JAPAN'S CONSUMER SOCIETY: A CRITICAL INTRODUCTION 175 (Frederick M. Uleman trans., 1999).

[106] Marx, *supra* note 104; *see also* Sam Joseph, *P2P: The Japanese Angle*, J@PAN INC. (Apr. 2001), http://www.japaninc.com/article.php?articleID=112 (contrasting Gnutella and other early post-Napster U.S. P2P software with Japan's "nascent" P2P scene in 2001).

[107] David W. Marx, *The Great Shift in Japanese Pop Culture – Part Two: The Implosion of Cultural Markets*, NEOJAPONISME (Nov. 29, 2011), http://neojaponisme.com/2011/11/29/the-great-shift-in-japanese-pop-culture-part-two/

Instead, Japanese consumers rely on books or CDs to engage with popular culture.[108] Japanese users, by and large, look at the Internet with suspicion, and do not use the Internet as their primary resource for finding information.[109] Therefore, *Winny* may not have had the effect of deterring users from seeking out copyrighted material on the Internet; rather, Japanese users do not think to use the Internet to find such material at all.

Sam Joseph, a Tokyo-based consultant, notes that Yuichi Kawasaki, the founder of early Japanese P2P software Jnutella, describes Japanese interaction with technology as favoring such a closed cell phone network. Joseph writes:

> "Japanese people often think of their computers as 'cold media'—I think they prefer more direct interaction." Kawasaki says, offering his own spin on why cellphones are so big in Japan. Everyone has his own theory on this. Whatever the reason, be it a preference for cute handheld devices, easy Japanese character entry, or lack of space for bulky desktops, no one is questioning that the Japanese mobile phone market is huge. Kawasaki has problems, however, with Japan's much-touted wireless Web. "It's very restricted right now, with companies like DoCoMo [Japan's largest cell phone company] controlling content. . . ."[110]

Reliance on these closed systems may explain the general dearth of Japanese P2P infringement compared to that in the United States. While Internet bulletin-board web-based, and Napster infringement were flourishing in the United States during the 1990s and 2000s, Japanese technology enthusiasts had other options for acquiring (and paying for) media, such as downloading games through satellite or cell phone services, writing video games to cartridges at convenience stores, and purchasing goods at used media markets. Indeed, in a 2006 report, ninety percent of Japanese music downloads were on closed mobile phone networks.[111]

The lack of cultural penetration and tech start-ups may also be caused by the poor working conditions in Japanese IT. A post on Global Voices Online describes working conditions as abysmal in many Japanese IT shops:

> Not surprisingly, young Japanese are none too keen to work in

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(emphasis added).
[108] *See id.*
[109] *Id.*
[110] Joseph, *supra* note 106.
[111] Steve McClure, *2006 J-Pop? It's downloaded on your phone*, DAILY YOMIURI (Dec. 23, 2006).

> such coding sweatshops, which are all too real . . . It doesn't help that programmers are associated in the public eye with social ineptness, and that the programming task itself is often viewed as grunt work, or not understood at all . . . Young Japanese are steadily fleeing the industry, and the exodus is one of the main reasons why Japan is losing its competitiveness in the new digital age.[112]

However, a Japanese coder described in the article, Ryo Asai, is less pessimistic about the Japanese IT environment. Instead, he bemoans the de jure retirement age of thirty-five for Japanese programmers.[113] Many Japanese companies shift programmers into management or consulting at age thirty-five, which prompted Asai to take his skills to Internet retailer Amazon.[114] Even discounting the bleak picture of Japanese IT as a sweatshop (as Asai does), corporate policy in the country ultimately means that young people do not consider programming to be a sexy career, and even passionate programmers are forced out of the field at age thirty-five.[115] Considering these factors, the low cultural penetration of an Internet culture in Japan is unsurprising.

However, despite the Internet's failure to penetrate Japanese culture, the number of P2P users is rising even after the arrest of Kaneko and the users infringing copyrights through Winny. The year 2007 saw a 180% increase in Japanese file sharing. Industry reports suggested that P2P use by Internet users climbed from 3.5% in June 2006 to 9.6% in September of 2007.[116] Those users shared more files as well, from an average of 194 downloaded files in June 2006 to 481 by September of 2007.[117] The Japanese newspaper *Yomiuri Shimbun* estimated that in 2008 1.75 million people used file-sharing software in Japan.[118] The continued arrests of Share and Perfect Dark users suggest any

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[112] Chris Salzberg, *Japan's IT Exodus: A Personal Perspective (Part 1)*, GLOBAL VOICES (Feb. 9, 2012), http://globalvoicesonline.org/2011/10/30/japan%E2%80%99s-it-exodus-a-personal-perspective-part-1/.

[113] *See id.* ("[I]n Japan, there actually are a lot of places that impose this age limit of 35 when recruiting programmers, and from my experience, they favor younger programmers because that way they can keep costs down, leaving you with less and less programming work [as you get older].").

[114] *Id.*

[115] *Id.*

[116] *Japanese File-Sharing Population Explodes*, TORRENTFREAK, (Dec. 21, 2007), http://torrentfreak.com/japanese-file-sharing-population-explodes-071221/.

[117] *Id.*

[118] Jared Moya, *Japanese ISPs to Ban File-Sharers from the Internet*, ZEROPAID, (Mar. 17, 2008), http://www.zeropaid.com/news/9333/japanese_isps_to_ban_filesharers_from_the_internet/.

chilling effect on users has been minimal.[119] Indeed, a Northwestern University study suggests that, like U.S. users, Japanese users have begun to embrace the decentralized P2P software Bittorrent as a means of file exchange, so much that not even a natural disaster can keep them away.[120] Northwestern's software found approximately 4,000 to 8,000 Bittorrent peers in Japan over the course of a few weeks in March 2011.[121] The number of peers was largely identical the weeks of March 2 and March 9 (with a twenty-five percent drop off on Friday, March 11, the day of Japan's devastating earthquake and tsunami, though peer activity returned to normal by Saturday morning).[122]

VII. CONCLUSION

Though it may first appear that Japan has taken a very different approach to P2P contributory infringement, it is likely *Winny* can live in a universe with the *Sony* and *Grokster* decisions. Indeed, in discussing Kaneko's desire to test a P2P system and acquire fame on the Internet, the Japanese Supreme Court seems to find that Winny was pure software in an impure world, and through its decision has taken a strongly pro-technology stance by adopting a fault-based regime for contributory infringement in the Internet age. Without that high level inducement, *Winny* seems to follow a path similar to *Sony's* value-neutral test. The use of that value-neutral test could have significant implications for software innovation in Japan. This is especially true because indirect infringement is a criminal act in Japan. Though threats of litigation could continue to have a chilling effect in the country, authors like Kaneko need not worry as much about criminal sanctions.

While the technological lag in Japan (as compared to the United States or Europe) could be blamed on *Winny*, the lag may also be explained by Japan's technological culture. In the last twenty years, Japanese consumer and media companies have emphasized the access of closed networks on cell phones, game consoles, and other closed non-PC devices over PCs and P2P software. The lag may also be explained by the way IT workers are treated in Japan and the ongoing suspicion with which the Japanese public views a "free" Internet culture, represented largely by 2ch. Despite the different emphasis on technology in Japan, litigation has not slowed the growth of P2P programs, as Share, Perfect Dark, and Bittorrent have all followed Winny. Therefore, the chilling effect of the criminal litigation against Kaneko on Japanese developers is overstated. Noting the changing times and the need for Japanese legal norms to change, a statement by

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[119] *See supra* note 97-100 and accompanying text (describing various arrests of file-sharing software users after *Winny*).
[120] Nate Anderson, *Japan's Earthquake Didn't Even Slow BitTorrent Use*, ARS TECHNICA (Apr. 5, 2011), http://arstechnica.com/tech-policy/news/2011/04/japans-earthquake-didnt-even-slow-bittorrent-use.ars.
[121] *Id*.
[122] *Id*.

Kaneko, made after the Kyoto Court's decision, seems prescient in light of the Supreme Court's final decision:

> Today, I have been found guilty as an accessory to copyright violation. Winny's usefullness [sic] is something [sic] that will extend into the future. Therefore, I believe that it's [sic] true value will be recognized in the future. I am disappointed [sic] with the present ruling.
>
> I have repeatedly warned, "do not exchange illegal files" when releasing Winny. And I have repeatedly warned against illegal file exchanges in my commnets [sic] to 2-channel and other forums. I am not sure what more would be needed to further make my case.
>
> My biggest concern about this ruling is the chilling effect that many software developers may shy away from developing useful technologies, fearing prosecution based on this vague [possibility] of becoming an accessory. This saddens me the most. Times are changing, and we need to cope with that.
>
> I am going to appeal this ruling, in order to raise awareness on the role of technology in these times.[123]

In acquitting Kaneko, the Japanese Supreme Court decided that the authors of P2P tools are not automatically held liable for infringement by users. Authors now need not worry about being criminally convicted if they themselves did not encourage end-user infringement, removing one barrier to technological innovation in Japan.

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[123] Toshimitsu Dan, 金子氏のコメント [*The Comment of Mr. Kaneko*], 壇弁護士の事務室 [THE OFFICE OF LAWYER DAN] (Dec. 13, 2006), http://danblog.cocolog-nifty.com/index/2006/12/post_2bee.html, *translated in* Press Release, *On P2P Developer Trial*, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY (Dec. 17, 2006), http://cpsr.org/act/global/japan/enews/Winny2006/.